RECORD AND BRIEFS

FILED
JUN 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-285, 16-300, 16-307

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORP.,
Petitioners,
v.
JACOB LEWIS,
Respondents.

ERNST & YOUNG LLP and ERNST & YOUNG U.S. LLP,
Petitioners,
v.
STEPHEN MORRIS and KELLY MCDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC. *et al.*,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN NOS. 16-285 AND 16-300, AND IN SUPPORT OF RESPONDENT MURPHY OIL USA, INC. IN NO. 16-307

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Date: June 16, 2017

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QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared frequently before this and other courts to support the right of private parties to enter into binding agreements to arbitrate disputes arising between them, as a quicker and more efficient alternative to civil litigation. *See, e.g., Bloomingdale's. Inc. v. Vitolo*, No. 16-1110 (U.S., cert. petition filed Mar. 9, 2017); DIRECTV, *Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). Also, WLF's publishing arm frequently produces articles and other educational materials related to arbitration. *See, e.g.*, Alan S. Kaplinsky and Mark J. Levin, *CFPB's Proposed Arbitration Rule Benefits Class-Action Lawyers at the Expense of Consumers*, WLF Legal Backgrounder (Oct. 14, 2016).

The Federal Arbitration Act (FAA) requires courts to enforce arbitration agreements strictly according to their terms. These petitions involve several instances of lower courts yet again refusing to follow the FAA's directive requiring arbitration

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

contracts to be enforced as written.

The Seventh and Ninth Circuits, relying on the National Labor Relations Act, declined to enforce representative-action waivers in the parties' arbitration agreements, citing an alleged need to vindicate federal labor-law policy. Their refusal to do so flouts the FAA and this Court's decisions construing that statute.

WLF seeks uniform application of the FAA nationwide to ensure that arbitration achieves its basic purpose: resolving disputes efficiently, predictably, and cost-effectively. The Seventh and Ninth Circuits' decisions thwart this goal. In the absence of federal statutes that clearly express congressional intent to override the policies of the FAA in specified circumstances, WLF opposes efforts by some lower courts to craft their own exceptions to the FAA's goals.

STATEMENT OF THE CASE

These three consolidated petitions all address the enforceability of agreements requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.[2] In Nos. 16-285 ("*Epic Systems*") and 16-300 ("*Ernst & Young*"), the Seventh Circuit and the Ninth Circuit held, respectively, that such agreements are unenforceable

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[2] In each of the three petitions, the substantive claim for which the employer sought individualized arbitration was a claim that the employer had improperly deprived employees of overtime pay, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*

because they violate an employee's right to engage in collective action under Section 7 of the National Labor Relations Act (NLRA). *Epic Systems* Pet. App. 1a-29a; *Ernst & Young* Pet. App. 1a-42a.

In No. 16-307 ("*Murphy Oil*"), the National Labor Relations Board (NLRB) had reached a similar conclusion in connection with its decision in an unfair-labor-practices proceeding. *Murphy Oil* Pet. App. 17a-208a. The Fifth Circuit disagreed with the NLRB. It granted the employer's petition for review in substantial part, holding that the FAA requires enforcement of such arbitration agreements. *Id.* at 1a-16a. It held that Murphy Oil did not commit an unfair labor practice by requiring employees to sign arbitration agreement or seeking to enforce them in subsequent court proceedings. *Id.* at 2a.

The Fifth Circuit also rejected the NLRB's analysis of arbitration agreements in a prior decision, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). *D.R. Horton* concluded that nothing in the NLRA "contains a congressional command to override the FAA," which, it noted, "establishes a 'liberal federal policy favoring arbitration.'" *Id.* at 360 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). The court held that an employer does not engage in an unfair labor practice by maintaining and enforcing an arbitration agreement that requires employment-related claims to be resolved through individual arbitration because: (1) the NLRA does not contain a clear congressional command prohibiting such agreements; and (2) "use of class action procedures ... is not a substantive right" under Section 7 of the NLRA. *Id.* at 357, 360-62. The Fifth Circuit's August

2015 *Murphy Oil* decision re-affirmed *D.R. Horton*. *Murphy Oil* Pet. App. 7a-8a.

In a May 2016 decision, the Seventh Circuit disagreed with the Fifth Circuit's analysis and affirmed denial of a motion to compel arbitration. *Epic Systems* Pet. App. 1a-23a. It concluded that "the phrase 'concerted activities' in Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies." *Id.* at 6a. The court viewed collective-litigation rights as an essential aspect of the NLRA because Congress's "purpose" in enacting the NLRA was "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of his employment" and because "collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power." *Ibid.*

The Seventh Circuit discerned no conflict between its interpretation of Section 7 and the FAA's endorsement of arbitration agreements. The court concluded that the FAA's "savings clause"[3] permits the invalidation of any arbitration agreement that is "unlawful" and that the agreement that Epic Systems sought to enforce was unlawful because it "strip[ped] away employees' rights to engage in 'concerted activities,'" in violation of Section 7 of the NLRA. *Id.* at 15a. The court held that the Section 7 collective-action

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[3] The FAA permits the invalidation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

right is a "substantive" right that (unlike a procedural right) is not waivable. *Id.* at 21a (stating that "[a]rbitration agreements that act as a 'prospective waiver of a party's right to pursue statutory remedies'—that is, of a substantive right—are not enforceable") (quoting *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013).

In its August 2016 decision, a divided Ninth Circuit panel agreed with the Seventh Circuit's analysis (and explicitly disagreed with the Fifth Circuit as well as decisions from the Second and Eighth Circuits). *Ernst & Young* Pet. App. 24a n.16. The majority stated:

> Concerted activity—the right of employees to act *together*—is the essential, substantive right established by [Section 7 of] the NLRA, 29 U.S.C. § 157. Ernst & Young interfered with that right by requiring its employees to resolve all of their claims in "separate proceedings." Accordingly, the concerted action waiver violates the NLRA and cannot be enforced.

Id. at 3a. The majority stated, "The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims." *Id.* at 14a. It held that the FAA does not require a contrary result because "the FAA recognizes a general contract defense of illegality" and the limitation on "concerted work-related legal claims" is illegal under Section 7. *Ibid.* It deemed the right to pursue such

claims a "substantive right"—that is, one of "the essential operative protections" of the NLRA—and thus one that "cannot be waived in arbitration agreements." *Id.* at 15a.

Judge Ikuta dissented. *Id.* at 25a-42a. She contended that the majority erred by focusing on whether the NLRA confers "substantive rights" and that its decision conflicts with this Court's case law regarding when a federal statute should be deemed to override's the FAA's mandate. *Id.* at 29a. She concluded that this Court's analysis of the issue:

> [H]as focused primarily on a single question: whether the text of the federal statute at issue expressly precludes the use of a predispute arbitration agreement for the underlying claims at issue. If the statute does not, the Court's "healthy regard for the federal policy favoring arbitration" leads it to conclude that there is no such contrary command, and the Court reads the purportedly contrary federal statute to allow the enforcement of the agreement to arbitrate.

Id. at 33a-34a (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). She concluded that nothing in the NLRA "creates a substantive right to the availability of class-wide claims that might be contrary to the FAA's mandate." *Id.* at 35a.

SUMMARY OF ARGUMENT

Section 2 of the FAA makes agreement to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In its landmark *Concepcion* decision in 2011, the Court held that the FAA creates a nationwide policy unequivocally favoring enforcement of arbitration agreements. The Court sent a strong message to lower courts: cease your hostility to arbitration agreements; you may not rely on state or federal law to refuse to enforce such agreements save in exceptional circumstances. *Concepcion*, 563 U.S. at 341-51. In particular, the Court concluded that the FAA prevents courts from conditioning approval of a non-judicial forum on the parties' acceptance of class-wide arbitration. *Id.* at 344 (stating that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

The Seventh and Ninth Circuits' refusals to enforce arbitration agreements in the employment context are simply the latest manifestations of judicial hostility to arbitration agreements. Their refusals are inconsistent with the Court's arbitration case law and should be reversed. The Fifth Circuit correctly concluded that federal law permits employees to voluntarily relinquish their rights to pursue class or collective claims in all forums.

The Court's *Italian Colors* decision is on all fours with this case and requires enforcement of the arbitration agreements at issue. *Italian Colors* held

that "courts must rigorously enforce arbitration agreements according to their terms, ... including terms that specify *with whom* the parties choose to arbitrate their disputes, ... and the rules under which arbitration will be conducted." 133 S. Ct. at 2309 (emphasis in original) (citations omitted). The Court added, "That holds true for claims that allege violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Ibid* (quoting *CompuCredit v. Greenwood*, 565 U.S. 95, 98 (2012)). Just as in *Italian Colors*, enforcement is required here because federal law contains no express congressional command that overrides the FAA.

Section 7 of the NLRA, on which the Seventh and Ninth Circuits relied, says nothing to suggest an intent to override the FAA.[4] It protects the right of workers "to engage in other concerted activities for the purpose of ... other mutual aid or protection," but it does not state that the protected "concerted activities" include the right to assert legal claims on a class-wide basis. Even assuming that "concerted activities" include the filing of legal claims (whether before a court or an arbitrator), employees are quite capable of

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[4] Section 7 states, in relevant part:

> Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities.

29 U.S.C. § 157.

filing such claims in concert with one another without resorting to representative actions—whereby one or more employees purport to file suit on behalf of absent class members.

It is particularly unlikely that Congress sought to protect a class-action right when it adopted the NLRA in 1935, given that modern class-action practice did not emerge until the 1966 revision of Fed.R.Civ.P. 23. Moreover, Section 7 has long been understood as protecting employees from retaliation for engaging in protected concerted activities, *not* as ensuring the success of any such activities. Section 7 may well bar an employer from retaliating against an employee who files a putative class action against it. But the statute does not bar the employer from raising defenses against certification of a class, including a defense based on a pre-existing arbitration agreement.

Both the Seventh and Ninth Circuits relied on the FAA's savings clause as a rationale for overcoming the FAA's command that arbitration agreements be enforced. That clause is inapplicable here. It permits the invalidation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." But Section 7 of the NLRA does not articulate a generally applicable rule of contract law that could be applied as a basis for revoking "any contract." Rather, the Seventh and Ninth Circuits interpret Section 7 as permitting the revocation of a small number of contracts entered into between employers and employees. As this Court has repeatedly held, such rules of law—by treating arbitration agreements with particular disfavor—do

not qualify as generally applicable laws of the sort to which the FAA's savings clause applies.

Because the NLRA contains no "congressional command" overriding the FAA, it is largely irrelevant whether the collective-action right allegedly protected by Section 7 should be deemed "substantive" or "procedural." In any event, the Seventh and Ninth Circuits clearly erred in classifying that alleged right as "substantive." The class-action device created by Rule 23 has long been understood by this and other courts as a procedural mechanism that promotes litigation efficiency, by enabling litigants to avoid the time and expense of trying (and deciding) the same claims repeatedly. It is not intended to bestow substantive advantages to one side or the other of a lawsuit.

Indeed, if the opportunity to seek class-wide adjudication *were* deemed a "substantive" right, that would call the legality of Rule 23 into serious question. It is only by virtue of adoption of the modern Rule 23 that, according to the Seventh and Ninth Circuits, the "substantive" protections of Section 7 were expanded to include the right to adjudicate employee-related rights on a class-wide basis. The Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). Yet, the classification of the opportunity to seek class-wide adjudication as a "substantive" right would accomplish precisely what the Rules Enabling Act forbids: it would utilize Rule 23 to "enlarge" the "substantive right[s]" of employees in pressing legal claims against their employers.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT REQUIRES ENFORCEMENT OF THE ARBITRATION AGREEMENTS AT ISSUE IN THESE PETITIONS

Enacted "in response to widespread judicial hostility to arbitration, the FAA requires courts to "rigorously enforce arbitration agreements according to their terms," including terms "under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2308-09 (citations omitted). Since the FAA's enactment, this hostility has continued to manifest itself through "a great variety of devices and formulas" to avoid enforcing arbitration agreements as written. *Concepcion*, 563 U.S. at 342.

One such device is an inappropriately broad interpretation of the FAA's savings clause, which permits courts to invalidate arbitration provisions on grounds that would apply equally to all contracts. *Id.* at 339-44. Some courts invoke this clause to cloak a hostility to arbitration by declaring that arbitration procedures need not be enforced based on policy concerns for the vindication of a federal statute.

The Seventh and Ninth Circuits employed that device here. They asserted that by invoking the FAA's savings clause as a means of invalidating arbitration agreements whose enforcement would otherwise be mandated by the FAA, they can avoid an alleged conflict between two federal statutes—the FAA and the NLRA. *Epic Systems* Pet. App. 15a; *Ernst & Young* Pet. App. at 14a. Those courts misinterpreted the savings clause and failed to follow this Court's

prescribed method for determining whether, despite the FAA's mandate, federal law prevents enforcement of an arbitration agreement.

A. Class Arbitration, Unless Agreed to by the Parties, Is Inconsistent with the FAA

The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision establishes a "liberal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. Indeed, "the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344.

The underlying employee claims in the three petitions are substantially similar; each involves alleged failure to pay overtime wages, in violation of the FLSA. Prior to asserting those claims, each of the employees had entered into an arbitration agreement with his employer. Those agreements each provided that: (1) any employment-related disputes would be resolved by arbitration rather than in a court proceeding; and (2) the arbitration would proceed on an individualized, not a class-wide, basis. When, despite those agreements, the employees filed lawsuits asserting FLSA claims on behalf of themselves and similarly situated employees, the employers moved to compel arbitration.

As each of the appeals courts recognized, this Court has routinely enforced arbitration agreements

when the underlying claim alleges violation of a federal statute. More than 25 years ago, in the context of a suit for violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, this Court stated:

> It is by now clear that statutory claims may be subject to an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years, we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et. seq.*; and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77/(2). ... In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

In light of *Gilmer*, there is no plausible argument that the arbitration agreements at issue here are unenforceable insofar as they require that the FLSA claims be heard by an arbitrator instead of a court. Indeed, neither the Seventh nor the Ninth

Circuit made that argument. Instead, they challenged the enforceability of the requirement that arbitration proceed on an individual basis, not on a collective basis. *See, e.g., Ernst & Young* Pet. App. at 14a (stating that "[t]he problem with the contract at issue is not that it is requiring arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims").

Any effort to mandate that arbitration proceed on a collective basis runs headlong into *Concepcion*, which held unequivocally that "class arbitration, to the extent it is manufactured by [judicial decree] rather than consensual, is inconsistent with the FAA." *Concepcion*, 563 U.S. at 348. The Court noted, for example, that conducting arbitration on a class-wide basis sacrifices many of the advantages of arbitration that likely prompted the parties to agree to arbitration in the first instance. *Id.* at 348-51. In particular, "the switch from bilateral to class arbitration sacrifices the principal advantages of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348.

It is disingenuous for the Seventh and Ninth Circuits to assert that they are willing to abide the parties' choice of an arbitral forum and are declining to enforce the arbitration agreements only with respect to the requirement that disputes be resolved on an individual basis. As *Concepcion* makes plain, no employer would agree to arbitrate claims if it knew that arbitration would proceed on a class-wide basis. Accordingly, the Seventh and Ninth Circuit decisions must be evaluated on the basis of their inevitable

effect: the abolition of mandatory arbitration agreements between employers and employees.

B. The NLRA Contains No Express Congressional Command that Overrides the FAA

In light of the FAA's strong endorsement of the enforceability of arbitration agreements, the Court has placed on the party opposing enforcement the burden of demonstrating why the FAA should be overridden. *Gilmer*, 500 U.S. at 26 ("the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for" a federal statutory claim.). In a series of cases involving federal statutory claims, the Court has made clear precisely what that burden entails. The party opposing enforcement must demonstrate that "the FAA's mandate has been overridden by a contrary congressional command." *Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 98; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). If such a command exists, it "will be discoverable in the text," the statute's "legislative history," or "an inherent conflict between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. As the Fifth Circuit correctly determined, the NLRA does not include a "congressional command" that the FAA's mandate (to enforce arbitration agreements according to their terms) is overridden by Section 7's protection of employees' right to engage in "concerted activities." *D.R. Horton*, 737 F.3d at 360-62.

Nothing in the text of Section 7 comes anywhere near to qualifying as a "congressional command" that

overrides the FAA's mandate. In addition to granting employees the right to engage in several specific collective activities (*e.g.*, to form a union and to bargain collectively through representatives of their own choosing), Section 7 includes a residual grant: "to engage in other concerted activities for the purpose of ... other mutual aid or protection." Nothing in that generalized language (or in the NLRA's legislative history) suggests that Congress had class-wide adjudication in mind when it referred to "other concerted activity," let alone that it intended to override the FAA's mandate so as to bar the enforcement of arbitration agreements that preclude class-wide adjudication.

In each of the cases cited above, the Court concluded that those opposing enforcement failed to demonstrate a "congressional command" to override the FAA's mandate. *Italian Colors*, 133 S. Ct. at 2309-10; *CompuCredit*, 565 U.S. at 98-102; *Gilmer*, 500 U.S. at 27-29; *McMahon*, 482 U.S. at 240. It so held, even though several of the federal statutes in question included provisions expressly permitting collective actions in federal court. *See, e.g., Gilmer*, 500 U.S. at 32 (that the text of the ADEA "provides for the bringing of a collective action" to enforce statutory rights held insufficient to establish the existence of a congressional command to override the FAA's mandate). Given those prior decisions, there is no plausible basis for concluding that the Court should reach a contrary result with respect to the NLRA, a statute that is silent on the subject of collective actions.

Importantly, the Court has been explicit that any "override" of the FAA must be a *congressional*

override. The NLRB held for the first time in *D.R. Horton* that Section 7 creates a substantive right for employees to assert legal claims (alleging FLSA violations) on a class-wide basis. It confirmed that holding in *Murphy Oil*. *Murphy Oil* Pet. App. 17a-208a. But because those administrative holdings do not constitute congressional action, they are irrelevant to this Court's determination of whether the FAA's pro-arbitration mandate should be enforced in this instance.

In sum, those seeking to avoid enforcement of the arbitration agreements at issue here have failed to demonstrate that a contrary congressional command has overridden the FAA's mandate. Under the Court's case law, that failure requires that the arbitration agreements be fully enforced.

C. The FAA's Savings Clause Is Inapplicable Because Arbitration Opponents Can Point to No Generally Applicable Rule of Law as a Basis for Denying Enforcement

Neither the Seventh nor the Ninth Circuit undertook the "contrary congressional command" analysis mandated by this Court's case law. Instead they each purported to harmonize the FAA and the NLRA by determining that the FAA's savings clause renders the FAA's pro-arbitration mandate inapplicable. *See Epic Systems* Pet. App. at 18a ("If these statutes are to be harmonized—and according to all the traditional rules of statutory construction they must be—it is through the FAA's savings clause, which provides for the very situation at hand. Because the

NLRA renders Epic's arbitration provision illegal, the FAA does not mandate its enforcement"); *Ernst & Young* Pet. App. at 16a ("[W]hen an arbitration contract professes the waiver of a substantive federal right, the FAA's savings clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield.").

The Seventh and Ninth Circuits have not simply ignored the "contrary congressional command" analysis mandated by this Court. They have also badly misinterpreted the FAA's savings clause, which is inapplicable here. That clause permits the invalidation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." By its terms, the clause is irrelevant when the alleged "ground" for revocation (here, Section 7 of the NLRA) is not one that can be invoked to revoke "any" contract. Instead, as interpreted by the Seventh and Ninth Circuits, Section 7 invalidates only a very small number of contracts: those that directly interfere with employees' Section 7 rights to form unions, collectively bargain, or engage in other "concerted activities" protected by Section 7.

This Court has repeatedly rejected efforts to invoke the FAA savings clause on a ground that could not serve as a basis for invalidating *any* contract. *See, e.g., Kindred Nursing Centers L.P. v. Clark*, 137 S. Ct. 1421 (2017); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984); *Concepcion*, 563 U.S. at 341-344. *Concepcion* explained that while the FAA's savings clause "preserves generally applicable contract defenses," it does not preserve rules that interfere with the FAA's objectives, *id.* at 341, and that would have "a

disproportionate impact on arbitration agreements." *Id.* at 342.

The Seventh and Ninth Circuits seek to avoid that savings-clause case law by contending that Section 7 renders "unlawful" arbitration agreements that ban assertions of claims on a class-wide basis, and that a "general contract defense of illegality" permits invalidation of such agreements. *Ernst & Young* Pet. App. at 14a; *Epic Systems* Pet. App. 15a.[5] But that rationale would allow the savings-clause exception to swallow the rule. Whenever a party alleges that enforcing an arbitration agreement is inconsistent with some federal-law policy, it can allege "illegality" and (according to the Seventh and Ninth Circuits) avoid the FAA's mandate by invoking the savings clause. *Concepcion* explicitly rejected such a broad reading of the savings clause, stating that the FAA "cannot be held to destroy itself." 563 U.S. at 343.

D. The Savings Clause Does Not Apply to Potentially Conflicting Federal Statutes

The savings clause is also inapplicable because the policy to be "saved" derives from another federal statute, not state law. As Sixth Circuit Judge Sutton has explained, "Savings clauses save state laws from preemption; they don't save other federal statutes enacted by the same sovereign. Federal statutes do not

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[5] The NLRB has interpreted the savings clause in similar manner. *Murphy Oil* Pet. App. 17a-88a. Because the NLRB bears no responsibility for administering the FAA, its interpretation of that statute is not entitled to deference.

need to be 'saved' by a coequal statute in order to have effect." *NLRB v. Alternative Entertainment, Inc.*, ___ F.3d ___, 2017 WL 2297620 at *18 (6th Cir. 2017) (Sutton, J., dissenting) (citations omitted). This Court has held that any potential conflicts between the FAA and another federal statute are to resolved by imposing on the party opposing arbitration the burden of demonstrating a "contrary congressional command'—not by invoking the FAA's savings clause.

II. THE NLRA DOES NOT CREATE A SUBSTANTIVE RIGHT TO PURSUE COLLECTIVE CLAIMS

A. Congress Could Not Have Intended to Grant a Right to a Procedure that Did Not Exist in 1935

In concluding that the arbitration agreements at issue here should not be enforced as written, both the Seventh and Ninth Circuits placed particular emphasis on their findings that the rights created by Section 7 of the NLRB are "substantive" rights, not procedural rights. Indeed, the Ninth Circuit deemed its conclusion that Section 7 rights are "substantive" to be "crucial" to its determination that the arbitration agreements at issue should not be enforced. *Ernst & Young* Pet. App. at 14a.

WLF notes initially that whether Section 7 rights should be deemed substantive or procedural is largely irrelevant to the key issue before the Court: whether the NLRA includes a "congressional command" overriding the FAA. As Judge Ikuta pointed out in dissent, "In every case considering a party's claim that a federal statute precludes enforcement of

an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." *Id.* at 29a (Ikuta, J., dissenting). In any event, there is little or no evidence to suggest that Section 7 confers a substantive right of the sort that the Ninth Circuit deemed "crucial" to its determination.

Section 7 of the NLRA grants employees several specified rights (including the right to form a union and to bargain collectively) as well as a residual right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Under a well-known canon of statutory construction, *ejusdem generis*,[6] the term "concerted activities" most logically refers to activities similar in nature to forming a union or collectively bargaining with one's employer. It is quite a stretch to suggest that the term also applies to the assertion of class-based legal claims, an activity very dissimilar to forming a union and engaging in collective bargaining.

Moreover, Congress adopted the NLRA in 1935. As this Court has recognized, "modern class action practice emerged in the 1966 revision of Rule 23." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-33 (2001). At the time of the NLRA's enactment, employees seeking to vindicate their rights under federal labor

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[6] That canon counsels, "Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 135 S.Ct. 1074, 2015 (2015).

law would have had no means of doing so on a collective basis. Because class actions as we know them today did not exist in 1935, it is illogical to read into Section 7 an intent to grant employees a "substantive" right to engage in collective litigation.

The Seventh Circuit dismissed those concerns. It asserted that even though employees could not have filed a collective action in 1935 seeking a monetary award for an alleged violations of a federal statutory right, Congress in 1935 was "aware" that some courts had in some limited instances authorized "class, representative, and collective legal proceedings." *Epic Systems* Pet. App. at 8a-9a. That assertion makes little sense. Awareness of the existence of some forms of collective legal proceedings provides no support for a conclusion that Congress intended to create a right to engage in other forms of collective legal proceedings that did not exist at the time it enacted legislation.

B. Section 7 of the NLRA Protects Employees from Employer Retaliation for Engaging in Concerted Activities

The Seventh and Ninth Circuits construed Section 7 as providing employees with a sword: it allegedly grants them a substantive right to assert legal claims in a specified manner. That construction misreads Section 7, which is more properly read as a *shield* against adverse employment actions taken in response to specified concerted activities.

The assertion that protected "concerted activities" include the filing of legal claims is based

entirely on *dicta* in a single decision of this Court: *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). *Eastex* held that concerted activities protected by Section 7 include the distribution of literature in non-working areas of the employer's property—even though the literature discussed political issues of interest to union members, and was not limited solely to issues directly relevant to working conditions in the plant. 437 U.S. at 570. The Court upheld an NLRB determination that the employer committed an unfair labor practice by refusing to permit distribution of the literature and threatening retaliation against employees who did so. *Id.* at 574-75.

In discussing the types of concerted activities that are protected by Section 7, the Court explained that the statute's coverage is not limited to "the narrower purposes of 'self-organization' and 'collective bargaining.'" *Id.* at 565. It then observed, "it has been held [by other tribunals] that the 'mutual aid and protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 565-66 (citing several appeals court and NLRB decisions). The Court never stated whether it agreed with those holdings.

More importantly, nothing in *Eastex* lends support to the view that Section 7 protects the right to file specific types of legal claims (such as class actions) without regard to whether employees have signed contracts agreeing not to pursue legal claims on a collective basis. Every one of the NLRB and appeals court cases cited by *Eastex* involved employees who were retaliated against by the employer for filing an

employment-related lawsuit. *Id.* at 566 n.15. Indeed, when the NLRB announced its expanded interpretation of Section 7 in 2012 in *D.R. Horton*, every case cited by the Board in support of that new interpretation was likewise a retaliation case. *See Murphy Oil* Pet. App. at 178 & n.78 (views of Member Johnson, dissenting). In other words, even if Section 7 prohibits retaliation against employees who pursue legal claims on a collective basis, that is a far cry from interpreting Section 7 as barring employers from raising arbitration-agreement defenses to such claims. As Judge Sutton explained:

> [T]he *pursuit* of collective litigation is a different activity from collective litigation itself. And if the protected activity is the *pursuit* of collective litigation, then the Board's interpretation accomplished nothing. Waivers do not inhibit the right to pursue a goal; they inhibit the ability to obtain it. In this case, employees who signed the class-action waiver can band together to lobby their employer to remove the waiver from the contract, or they can ask a court to declare the waiver invalid on some generally applicable ground. The employees' pursuit of collective procedures may or may not bear fruit, but the pursuit will nonetheless be protected from retaliation.

Alternative Entertainment, 2017 WL 2297620 at *16 (Sutton, J., dissenting).

C. Collective-Action Rights Are Procedural and Thus Waivable

In a number of cases, the Court has suggested that an employer may not require an employee to waive a *substantive* legal claim as a condition of employment. Thus, after reviewing decisions in which it had enforced agreements requiring employees to arbitrate a federal statutory claim, the *Gilmer* Court noted that requiring an employee to submit his statutory claim to arbitration does nothing to impair the claim itself:

> In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."

Gilmer, 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628). *Gilmer* does nothing to advance the anti-arbitration position in this case. That decision makes clear that the relevant *substantive* right is the underlying legal claim at issue—in these cases, the alleged failures to pay overtime wages, in violation of the FLSA. Adhering to the FAA by enforcing the arbitration agreements at issue will do nothing to prevent employees from pursuing their FLSA grievances. Indeed, they will be permitted to pursue those claims in a "concerted" manner by assisting each other with the filing of individual arbitration claims. The only relevant thing that enforcement of the agreements will do is to prevent employees from pursuing their arbitrations using class-based

procedures.

The Seventh and Ninth Circuits held that Section 7 creates a *substantive* right to pursue class-wide arbitration and is thus non-waivable. But that holding cuts against the understanding of this Court, which has regularly characterized the collective-action rights created by Fed.R.Civ.P. 23 as procedural in nature. *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (stating that Rule 23 creates "procedural right[s]" that are "ancillary to the litigation of substantive claims"). Indeed, Rule 23 was designed solely for the purpose of improving litigation efficiency, by enabling litigants to avoid the time and expense of trying (and deciding) the same claims repeatedly. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (stating that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.")

The Court has carefully distinguished substantive from procedural rules, in order to ensure that federal courts do not violate the *Erie* doctrine, which limits the power of federal courts to supplant state law with judge-made rules. In general, federal courts must follow state law unless the contrary rule it seeks to impose can reasonably be classified as "procedural." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). In cases raising state-law issues, federal courts are permitted to employ the class-action rules specified in Rule 23 only because that rule is deemed procedural, not substantive. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2016) (plurality

opinion). And, as the Seventh and Ninth Circuits concede, a procedural right is waivable.

The assertion by those courts that Section 7 creates non-waivable, substantive rights cuts against a long history of judicial acceptance that Section 7 rights may be waived. Indeed, it is a well-accepted and common practice for a union to waive all of its members' Section 7 rights—including the right to strike—in return for an employers acceptance of a collective-bargaining agreement (CBA) that mandates arbitration of all issues arising under the CBA. That practice is so well accepted that the Court has upheld an employer's right to an injunction against a strike (over an issue subject to arbitration) undertaken in violation of a CBA's no-strike clause. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970). If a union is permitted to waive Section 7 rights of all employees within its bargaining unit—even employees who are not members of the union—there can be little justification for refusing to grant individual employees a similar waiver right.

In sum, any Section 7 rights to file class-based claims are procedural rights which, even if they are deemed waived by virtue of an arbitration agreement, do not compromise an employee's right to vindicate his substantive claim under federal law. As the Court observed in *Shady Grove*, there is no *substantive* distinction between a class action filed on behalf of 999 absent class members and 1,000 separate lawsuits asserting the identical claims; the defendant's potential "aggregate liability ... does not depend on whether the suit proceeds as a class action." 559 U.S. at 408 (plurality opinion).

D. If the Collective-Action Rights Created by Rule 23 Were Deemed "Substantive," Rule 23 Would Violate the Rules Enabling Act

The Rules Enabling Act, 28 U.S.C. 2072(b), provides an additional reason for interpreting the collective-action right being asserted in these petitions as a procedural right. If that right were determined to be a substantive, non-waivable right, it would raise serious questions regarding the validity of Rule 23. As the Court recently explained:

> [C]ongressional approval of Rule 23 [does not] establish an entitlement to class proceedings for the vindication of statutory rights. ... [I]t is likely that such an entitlement, invalidating private arbitration agreements denying class adjudication, would be an "abridg[ment]" or "modif[ication]" of a "substantive right" forbidden to the Rules, see 28 U.S.C. § 2072(b).

Italian Colors, 133 S. Ct. at 2309-10.

It bears repeating that class actions as we know them today did not exist when Congress adopted the NLRA in 1935. Accordingly, no party to this cases asserts that employees in 1935 and subsequent decades had a right to insist that any arbitrations concerning employment issues be conducted on a class-wide basis. Rather, according to the NLRB, that right did not spring into existence until 1966 with the adoption of modern-day Rule 23. In light of that history, it is fair

to conclude that the substantive collective-action rights recognized by the Seventh and Ninth Circuits owe their existence to the adoption of the 1966 amendments to Rule 23.

Yet, "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights.'" *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 367 (2011) (citing 28 U.S.C. § 2072(b)). If Rule 23 (in conjunction with Section 7) were interpreted as creating the "substantive" rights recognized by the Seventh and Ninth Circuits, it would undoubtedly be "enlarg[ing]" substantive rights, in violation of the Rules Enabling Act. In order to avoid any questions regarding the validity of Rule 23, the collective-action rights asserted in these petition should be deemed merely procedural—and thus waivable. *See Murphy Oil* Pet. App. 187a (views of Member Johnson, dissenting) ("Overriding the FAA certainly is an abridgement of a party's rights–both under the FAA and under that party's contract—to have its arbitration agreement enforced. Simply put, Section 7 cannot enlarge Rule 23 beyond the ability of Rule 23's own authorizing statute.").

Moreover, in light of the fact that modern-day class actions developed decades after adoption of the NLRA, there can be no plausible claim that enforcement of arbitration agreements prevents the effective vindication of employees' rights. As the Court explained, in denying an effective-vindication argument raised by antitrust plaintiffs:

> The class-action waiver merely limits arbitration to the two contracting parties.

> It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief .... Or, to put it differently, the individual suit that was considered adequate to assure "effective vindication" of a federal right before adoption of class-action procedures did not suddenly become "ineffective vindication" upon their adoption.

Italian Colors, 133 S. Ct. at 2311.

In sum, nothing in the language or history of the NLRA supports a claim that Section 7 creates the "substantive" right asserted by the Seventh and Ninth Circuits: a non-waivable right to pursue employment-related legal claims on a collective basis.

CONCLUSION

The Court should reverse the judgments of the courts of appeals in Nos. 16-285 and 16-300, and affirm the judgment of the court of appeals in No. 16-307.

Respectfully submitted,

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June 16, 2017